

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

TIMOTHY MCGEORGE,

Plaintiff,

Case No. 3:17-cv-150

vs.

COMMISSIONER OF SOCIAL SECURITY,

Magistrate Judge Michael J. Newman
(Consent Case)

Defendant.

DECISION AND ENTRY: (1) REVERSING THE ALJ’S NON-DISABILITY FINDING AS UNSUPPORTED BY SUBSTANTIAL EVIDENCE; (2) REMANDING THIS CASE UNDER THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) FOR FURTHER PROCEEDINGS; AND (3) TERMINATING THIS CASE ON THE COURT’S DOCKET

This Social Security disability benefits appeal is before the undersigned for disposition based upon the parties’ consent. Doc. 15. At issue is whether the Administrative Law Judge (“ALJ”) erred in finding Plaintiff not “disabled” and therefore unentitled to Disability Insurance Benefits (“DIB”). This case is before the Court on Plaintiff’s Statement of Errors (doc. 9), the Commissioner’s memorandum in opposition (doc. 10), Plaintiff’s reply (doc. 11), the administrative record (doc. 7),¹ and the record as a whole.

I.

A. Procedural History

Plaintiff filed for DIB asserting disability as of May 16, 2009² as a result of a number of alleged impairments including, *inter alia*, lumbar pain, knee pain, depression, anxiety, bipolar disorder, and stomach ulcers. PageID 247-52.

¹ Hereafter, citations to the electronically-filed administrative record will refer only to the PageID number.

² This is Plaintiff’s second disability application. PageID 68. Plaintiff previously applied for DIB on December 11, 2012. *Id.* In a notice dated May 29, 2013, his application and request for reconsideration were both denied. *Id.* He did not challenge that determination. Accordingly, under

After an initial denial of his application, Plaintiff received a hearing before ALJ Mark Hockensmith on February 10, 2016. PageID 91-119. The ALJ issued a decision on March 23, 2016 finding Plaintiff not disabled. PageID 68-77. Specifically, the ALJ found at Step Five that, based upon Plaintiff's residual functional capacity ("RFC") to perform a reduced range of medium work,³ "there [are] jobs that exist[] in significant numbers in the national economy that [Plaintiff can] perform[.]" PageID 72-77.

Thereafter, the Appeals Council denied Plaintiff's request for review, making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 46-50. *See Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

B. Evidence of Record

The evidence of record is adequately summarized in the ALJ's decision (PageID 68-77), Plaintiff's Statement of Errors (doc. 9), the Commissioner's memorandum in opposition (doc. 10), and Plaintiff's reply (doc. 11). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this appeal herein.

II.

A. Standard of Review

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-

principles of administrative *res judicata*, the earliest Plaintiff can be found disabled is May 30, 2013. *See Drummond v. Comm'r of Soc. Sec.*, 126 F.3d 837, 840-43 (6th Cir. 1997).

³ The Social Security Administration ("SSA") classifies jobs as sedentary, light, medium, heavy, and very heavy depending on the physical exertion requirements. 20 C.F.R. § 404.1567. "Medium work" involves the occasional lifting of 50 pounds at a time, and frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c). Medium work can require standing and walking as much as six hours during any given eight-hour workday. *Id.* It may also involve frequent stooping, grasping, holding, and turning objects. *Id.* "The functional capacity to perform medium work includes the functional capacity to perform sedentary, light, and medium work." *Id.*

46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When substantial evidence supports the ALJ’s denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a “‘zone of choice’ within which he [or she] can act without the fear of court interference.” *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ’s legal analysis -- may result in reversal even if the ALJ’s decision is supported by substantial evidence in the record. *Rabbers v. Comm’r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). “[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right.” *Bowen*, 478 F.3d at 746.

B. “Disability” Defined

To be eligible for disability benefits, a claimant must be under a “disability” as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a “disability” includes physical and/or mental impairments that are both “medically determinable” and severe enough to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 404.1520(a)(4). Although a dispositive finding at any step ends the ALJ’s review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), the complete sequential review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
3. Do the claimant's severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner's Listing of Impairments (the "Listings"), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant's RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant's age, education, past work experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 404.1520(a)(4); *see also Miller v. Comm'r of Soc. Sec.*, 181 F. Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act. *Key v. Comm'r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

III.

In his Statement of Errors, Plaintiff alleges the ALJ erred by failing to properly weigh the medical opinion evidence of record. Doc. 10 at Page ID 619-22. Finding merit to the ALJ's weighing of the opinion by treating physician James E. Wilcher, D.O., the undersigned does not address the ALJ's analysis of the remaining medical opinion evidence, but directs that all medical evidence be assessed anew by the ALJ on remand.

Until March 27, 2017, "the Commissioner's regulations [that apply to this appeal] establish[ed] a hierarchy of acceptable medical source opinions[.]" *Snell v. Comm'r of Soc. Sec.*, No. 3:12-cv-119, 2013 WL 372032, at *9 (S.D. Ohio Jan. 30, 2013). In descending order, these medical source opinions are: (1) treaters; (2) examiners; and (3) record reviewers. *Id.* Under the regulations then in effect, which control here, the opinions of treaters are entitled to the greatest deference because they "are likely to be . . . most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical

evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations[.]” 20 C.F.R. § 404.1527(c)(2).

A treater’s opinions must be given “controlling weight” if “well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record.” *LaRiccia v. Comm’r of Soc. Sec.*, 549 F. App’x 377, 384 (6th Cir. 2013). Even if a treater’s opinion is not entitled to controlling weight, “the ALJ must still determine how much weight is appropriate by considering a number of factors, including the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinions, consistency of the opinions with the record as a whole, and any specialization of the treating physician.” *Blakley v. Comm’r of Soc. Sec.*, 581 F.3d 399, 406 (6th Cir. 2009); *see also* 20 C.F.R. § 404.1527(c)

After treaters, “[n]ext in the hierarchy are examining physicians and psychologists, who often see and examine claimants only once.” *Snell*, 2013 WL 372032, at *9.

Record reviewers are afforded the least deference and these “non-examining physicians’ opinions are on the lowest rung of the hierarchy of medical source opinions.” *Id.* “The regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual [claimant] become weaker.” *Id.* (citing SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996)).

The medical opinion evidence at issue in this case, *inter alia*, includes an opinion from Plaintiff’s treating family physician, Dr. Wilcher. PageID 478-91. Dr. Wilcher found Plaintiff “markedly”⁴ limited in his ability to maintain social functioning and in his ability to maintain concentration, persistence, or pace. PageID 486. Further Dr. Wilcher opined that Plaintiff could never climb, balance, stoop, crouch, kneel, or crawl. PageID 489. Overall, Dr. Wilcher opined

⁴ “Marked” limitations are suggestive of disability. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.00(C); *Lankford v. Sullivan*, 942 F.2d 301, 307 (6th Cir. 1991).

that Plaintiff is unable to work as a full-time employee because of a combination of dyspnea, depression, and weight loss. PageID 478-91. The ALJ assigned Dr. Wilcher's opinion "little weight." PageID 74.

A medical source's opinion -- including the opinion of a treating medical source -- that a claimant is disabled is an issue "reserved to the Commissioner" and not entitled to "any special significance." 20 C.F.R. § 404.1527(d)(1). In fact, "treating source opinions on issues reserved to the Commissioner are never entitled to controlling weight[.]" although they must be considered. *See* SSR 96-5p, 1996 SSR LEXIS 2, at *1 (1996).

With regard to Dr. Wilcher's opinion that Plaintiff is unable to work as a full-time employee, given that this opinion was on an issue reserved to the Commissioner, the ALJ properly determined that it was not entitled to controlling weight. As a result, Plaintiff's alleged error -- as to this specific opinion by Wilcher -- in this regard is without merit.

However, as to Dr. Wilcher's more specific functional capacity opinions, initially, the Court finds the ALJ erred by failing to analyze the § 404.1527(c)(2) controlling weight factors, *i.e.*, whether Dr. Wilcher's opinion was "well-supported by medically acceptable clinical and laboratory diagnostic techniques," and whether the opinion is consistent "with the other substantial evidence in [the] case record." *LaRiccia*, 549 F. App'x at 384. Such failure constitutes reversible error, *see Aytch v. Comm'r of Soc. Sec.*, No. 3:13-cv-135, 2014 U.S. Dist. LEXIS 115119, at *14 (S.D. Ohio Aug. 19, 2014), because the lack of explanation regarding the "controlling weight [analysis] hinders a meaningful review of whether the ALJ properly applied the treating-physician rule that is at the heart of this regulation." *Gayheart v. Comm'r of Soc. Sec.*, 710 F.3d 365, 377 (6th Cir. 2013) (citations omitted).

Even assuming, *arguendo*, that the ALJ conducted the controlling weight test -- which the undersigned concludes he did not -- the undersigned further finds the ALJ gave only

conclusory reasons as to the ultimate weight accorded. Specifically, while the ALJ found that “Dr. Wilcher’s medical opinion is not supported by the medical record and is inconsistent with other medical evidence of the record,” the ALJ fails to cite any specific treatment note(s) within those documents in support of such conclusory contention. Such omission is error and a separate, independent grounds meriting reversal. PageID 74; *see Friend v. Comm’r of Soc. Sec.*, 375 F. App’x 543, 551-52 (6th Cir. 2010) (holding that “it is not enough to dismiss a treating physician’s opinion as ‘incompatible’ with other evidence of record” in the absence of “some effort to identify the specific discrepancies and to explain why it is the treating physician’s conclusion” is accorded lesser weight).

The Court also notes that ALJ’s rejection of Dr. Wilcher’s opinion regarding Plaintiff’s mental limitations as improper. With regard to the ALJ’s rejection of Dr. Wilcher’s opinion regarding Plaintiff’s mental limitations on the basis that he is a family physician and not a psychiatrist, such critique is not relevant at the controlling weight stage of the treating physician analysis and, instead, is a factor “properly applied only after the ALJ has determined that a treating-source opinion will not be given controlling weight.” *Gayheart*, 710 F.3d at 376; *see also* 20 C.F.R. § 404.1527(c)(5). The courts have found that primary care physicians are able to provide opinions on mental impairments. Specifically, “it is well established that primary care physicians (those in family or general practice) ‘identify and treat the majority of Americans’ psychiatric disorders.’” *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). A family physician such as Dr. Wilcher is authorized to opine regarding Plaintiff’s mental status. *Wert v. Comm’r of Soc. Sec.*, 166 F. Supp. 3d 935, 946 (S.D. Ohio 2016); *Byrd v. Comm’r of Soc. Sec.*, No. 3:14-CV-242, 2015 WL 4540575, at *5 (S.D. Ohio May 29, 2015); *King v. Comm’r of Soc. Sec.*, No. 3:14-CV-351, 2016 WL 1729550, at *6 (S.D. Ohio Mar. 28, 2016).

Based on all of the foregoing, the undersigned finds error in the ALJ's analysis of Dr. Wilcher's multiple opinions. Accordingly, the ALJ's non-disability finding is found unsupported by substantial evidence.

IV.

When the ALJ's non-disability determination is unsupported by substantial evidence, the Court must determine whether to remand the matter for rehearing or to award benefits. Generally, benefits may be awarded immediately "if all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *Faucher v. Sec'y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994); *see also Abbott v. Sullivan*, 905 F.2d 918, 927 (6th Cir. 1990). The Court may only award benefits where proof of disability is strong and opposing evidence is lacking in substance, so that remand would merely involve the presentation of cumulative evidence, or where proof of disability is overwhelming. *Faucher*, 17 F.3d at 176; *see also Felisky v. Bowen*, 35 F.3d 1027, 1041 (6th Cir. 1994); *Mowery v. Heckler*, 771 F.2d 966, 973 (6th Cir. 1985). In this case, evidence of disability is not overwhelming. Therefore, a remand for further proceedings is proper. On remand, the ALJ should conduct an appropriate review of all medical opinion evidence of record.

V.

For the foregoing reasons, **IT IS ORDERED THAT**: (1) the Commissioner's non-disability finding is found unsupported by substantial evidence, and **REVERSED**; (2) this matter is **REMANDED** to the Commissioner under the Fourth Sentence of 42 U.S.C. § 405(g) for proceedings consistent with this opinion; and this case is **TERMINATED** on the docket.

IT IS SO ORDERED.

Date: April 20, 2018

s/ Michael J. Newman
Michael J. Newman
United States Magistrate Judge